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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutory provision that allows a claimant to petition the Customs Service for discretionary remission or mitigation of penalties for violations of the customs laws creates a property interest subject to the requirements of the Due Process Clause of the Fifth Amendment.

2. Whether, assuming that due process requirements apply to the remission decision, a claimant can establish a due process violation from delay in disposing of the petition without showing that the delay caused him prejudice and without regard to the nature of the government's reasons for the delay.

3. Whether, assuming that some process is due in connection with the remission decision, it includes a requirement that the Customs Service dispose of the petition within 24 hours of its submission in cases involving seized vehicles.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 660 F.2d 1319.[1] The findings of fact and conclusions of law of the district court (App. D, *infra*, 20a-25a) are unreported.

[1] The opinion as reported does not contain the modifications that the court of appeals made to its decision in denying the government's petition for rehearing. See App. B, *infra*.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 19a) was entered on November 2, 1981. A petition for rehearing was denied on May 1, 1982 (App. B, *infra*, 17a-18a). On August 9, 1982, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to September 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission

or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

In March or April 1974, respondent, an automobile dealer, purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada with the intention of bringing it into the United States (Tr. 13, 20-21). For this purpose, respondent had the automobile registered in the State of California and obtained California license plates for it (App. D, *infra*, 21a). On January 20, 1975, respondent arrived in Vancouver to take possession of the vehicle and obtained a release form from Canadian customs authorizing him to transport it through Canada to the United States-Canadian border in British Columbia. Canadian customs officials instructed him to deliver the form to the Canadian customs border station before leaving Canada (Tr. 27-30, 151; Apps. A and D, *infra*, 2a, 21a).

Later that day, respondent drove south toward the United States border. After failing to stop first at the Canadian customs station to surrender the release form as he had been instructed, he arrived at the United States border checkpoint at Blaine, Washington at approximately 5:00 p.m. (Tr. 31-32, 147; Apps. A and D, *infra*, 3a, 22a).[2]

Earlier that day Canadian customs officials had alerted United States customs officers at the Blaine checkpoint that a Jaguar Panther automobile had been off-loaded at the Vancouver ocean terminal and might be driven across the border into the United States (Tr. 110-111). As respondent drove up to the Customs

[2] Respondent testified that he inadvertently passed the Canadian Customs building because of poor visibility and inadequate directions (Tr. 31-32; App. A, *infra*, 2a).

primary inspection point, the inspector on duty recognized that the automobile matched the description given by the Canadians. After the inspector inquired whether respondent was a United States citizen and how long he had been outside the United States, he asked whether respondent had "purchas[ed] or acquir[ed] anything outside the United States" (Tr. 113). When respondent answered negatively, the inspector asked him whether he had anything to declare to Customs, "to make sure there was no mistake about what information was needed" (Tr. 114). Respondent indicated that the only property in his possession was his personal belongings (*ibid*).[3]

Following this exchange, the inspector directed respondent to park his car and to enter the Customs station. He then referred the case to his supervisor, giving as the reason for additional inquiry respondent's failure to declare the vehicle (Tr. 115-116). When the supervisory inspector asked respondent why he had failed to declare his automobile, respondent answered that he did not think he was required to. The officer then informed him that the vehicle was being seized because of his failure to declare it (Tr. 144-145, 148-149).[4]

The supervisor then completed the necessary seizure documents and assisted respondent in preparing a "Petition for Remission or Mitigation of Forfeitures and

[3] During the hearing, respondent conceded that he knew he had to declare his automobile at the United States Customs station. He claimed, however, that he understood the Customs inspector's question to relate exclusively to purchases or acquisitions made in Canada and that the inquiry thus did not refer to his automobile, since it had been purchased in Switzerland (Tr. 38-40).

[4] The statutory and administrative scheme for effecting forfeitures for violation of the customs law is detailed in our brief in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In United States Currency*, at 4-6 (No. 81-1062). A copy of the brief has been sent to respondent.

Penalties Incurred." In his very brief, handwritten petition, respondent stated that he "had no intention of avoiding U.S. Customs duties" and explained that he had mistakenly arrived at the United States Customs office after attempting to locate Canadian customs for the purpose of surrendering his Canadian release form (C.A. App. 10).[5] Upon completion of the necessary documents, the supervisor explained that respondent could obtain the release of his vehicle by posting a cash bond[6] and arranged for his transportation to a local hotel (Tr. 155-159).

2. Two weeks later, on February 3, 1975, respondent posted a bond for $24,500, the appraised value of his car, and Customs returned the vehicle to him (App. A, *infra*, 4a). On February 12, 1975, respondent filed with Customs a "Supplement to the Petition for Remission" in which he provided a detailed account of the circumstances surrounding his attempt to bring the automobile into this country. Respondent alleged for the first time that the customs inspector had never inquired whether respondent had anything to declare; he also repeated his earlier claim that he fully intended to pay the duty on the automobile (C.A. App. 11-14). Petitioner did not, however, request that his petition be acted upon with expedition.

[5] "C.A. App." refers to the excerpt of record filed with the court of appeals.

[6] Customs officials have discretion to release a seized vehicle to a person claiming a "substantial interest therein" upon payment of the value of the vehicle. 19 U.S.C. 1614. The payment serves as a bond to cover any penalty assessed for failure to make the declaration required by law. See 19 C.F.R. 162.43, 162.44(b).

On February 25, 1975, the Seattle District Director of the Customs[7] informed respondent that, upon consideration of his petition and the reported facts, the penalty for failing to declare the car in violation of 19 U.S.C. 1497, was being remitted to $3,600. The District Director therefore refunded $20,900 to respondent (C.A. App. 15). Respondent obtained an administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment (C.A. App. 17).

2. Respondent then filed the instant suit in the United States District Court for the Central District of California, seeking, *inter alia*, return of the $3,600 penalty and a declaration that the seizure of his automobile and the imposition of a penalty were unlawful (C.A. App. 2-9).[8] After an evidentiary hearing, the district court found that respondent had violated 19 U.S.C. 1497 by failing to declare his automobile and that, accordingly, the seizure of the vehicle by Customs was

[7] By statute, the Secretary of the Treasury is authorized to act on petitions for remission or mitigation. 19 U.S.C. 1618. This authority has been delegated to District Directors of the Customs Service in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. 171.21. The estimated value of respondent's car, $24,500, thus fell within the District Director's authority to act on petitions for remission or mitigation.

[8] The government filed a contingent counterclaim seeking recovery of the full $24,500 in accordance with 19 U.S.C. 1497, in the event the district court found the administrative mitigation proceedings invalid. The counterclaim was based upon the theory that, if the administrative settlement were found to be invalid, the government was free to seek forfeiture of the full value of the vehicle as a penalty for failing to declare it, just as if no administrative relief had ever been granted (C.A. App. 22-23, 32). The district court, which entered a judgment in favor of the government, denied the counterclaim (App. D, *infra*, 24a).

proper and the automobile was subject to forfeiture (App. D, *infra*, 24a). The district court also found that the remission and mitigation procedures followed by Customs "were proper" (*ibid.*).

3. The court of appeals affirmed the district court's determination that the seizure of respondent's vehicle was proper, finding that "[t]he record fully supports the district court's conclusion that [respondent] attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so." App. A, *infra*, 6a. It reversed, however, the district court's holding that the procedures followed by Customs in acting upon respondent's petition for mitigation were proper. Proceeding from the premise that in cases involving the seizure of an automobile "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618" (App. A, *infra*, 15a), it held that "the [one month] delay in processing [respondent's] petition for remission or mitigation * * * violated his due process right to prompt consideration of his claim" (*id.* at 16a).[9]

The court then articulated specific standards to be used by Customs prospectively to assure the prompt processing of petitions for administrative relief. Adopting the reasoning of the Second Circuit in *Lee* v.

[9] The court of appeals relied heavily upon the decision of the Second Circuit in *Lee* v. *Thornton*, 538 F.2d 27 (1976), in concluding that due process requires prompt disposition by Customs of administrative petitions for remission or mitigation of vehicle forfeitures. In *Lee* the court, relying upon the balancing analysis in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that when vehicles are seized for forfeiture, action on petitions for remission or mitigation should be required within 24 hours, unless a hearing on probable cause is requested by the claimant, in which event the hearing should be conducted within 72 hours of the seizure. 538 F.2d at 33.

Thornton, 538 F.2d 27, 33 (1976), the court of appeals here announced (Apps. A and B, *infra*, 15a-16a, 17a) (footnote omitted)[10] that

> in cases involving vehicles of transportation within the district director's authority [to grant petitions for remission or mitigation] under 19 C.F.R. § 171.21 (1980), the director should whenever feasible act on a petition for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim.

In a footnote, however, the court qualified the requirement that the district director must ordinarily grant or deny petitions for administrative relief within 24 hours of receipt by recognizing the possibility of a reasonable extension in cases where "unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay" (*id.* at 18a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the requirements of the Due Process Clause of the Fifth Amendment that are closely related to those presently before the Court in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In United States Currency*, cert. granted, No. 81-1062 (Mar. 22, 1982) (hereinafter *$8,850*). There, the court of

[10] In denying the United States' petition for rehearing, the court of appeals modified its original opinion to the language quoted above (see App. B, *infra*, 17a-18a). In its original form, the decision held that "the director must ordinarily, depending upon the nature of the article seized, act on a petition for remission or mitigation within 24 hours of receipt" (App. A, *infra*, 15a–16a). The court of appeals also amended one of the footnotes in its opinion. Compare App. A, *infra*, 16a n.16, with App. B, *infra*, 17a–18a.

appeals held that a forfeiture was barred because of an 18-month delay between the seizure and institution of judicial forfeiture proceedings. Among the questions before the Court in that case are whether there is a general due process requirement of prompt post-seizure filing of a judicial forfeiture action, whether delay in institution of judicial proceedings may be justified by the pendency of a parallel criminal investigation or prosecution or by the pendency of a petition for administrative remission or mitigation of forfeiture, and whether preclusion of an otherwise valid forfeiture is a proper remedy in the absence of a showing of prejudice resulting from the allegedly unjustified delay.

The holding of the court of appeals in the instant case turns not upon delay in instituting judicial proceedings, but upon delay in ruling on respondent's petition for administrative remission or mitigation. Nevertheless, the latter question is potentially present in *$8,850*. In that case, much of the 18-month delay between the seizure and the institution of judicial forfeiture proceedings, found by the court of appeals to violate due process, was the result of Customs' investigation of the claimant's petition for remission or mitigation. The court of appeals' decision could therefore be read to imply that there is a due process entitlement to prompt disposition of such administrative petitions. Accordingly, the government addressed that specific question in its brief. See 81-1062 Br. 41-45. In addition, the government's brief in *$8,850* analyzes the requirements of due process in regard to delays in processing forfeiture actions and the need to show prejudice as an element of a claim that the due process rights of the claimant have been violated. It thus seems likely that a reversal in *$8,850* would dictate a similar result in this case, and this Court therefore may wish to hold this petition pending its decision in *$8,850* and then dispose of the petition as appropriate in light of that decision.

It is our strong submission, however, that the decision in the present case is erroneous even if the decision of the court of appeals in *$8,850* is correct. That case involves a delay in filing judicial proceedings, which concededly are necessary at some point for purposes of confirming a contested forfeiture, while this case involves delay in a purely discretionary administrative proceeding. Moreover, that case involves a delay of 18 months, while this one involves a delay of only one month. In addition, as we explain more fully below, the holding of the court of appeals here turns normal due process concepts on their head by requiring disposition of remission petitions with such arbitrary speed that fair, accurate, and reasoned decision making is rendered virtually impossible. For these reasons, and because the decision of the court of appeals creates significant administrative problems for Customs and potentially injures the interests of persons whose automobiles have been seized for forfeiture in the Ninth Circuit (see App. E, *infra*), the Court may deem it appropriate to consider summary reversal in preference to holding the case pending the decision in *$8,850*.

1. As we have explained in our brief in *$8,850* (Br. 42), the procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979), citing *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976). By its terms, the Clause applies only in those circumstances in

which governmental action threatens to deprive a person of "liberty" or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).

The decisions of this Court make it clear that the government creates a property or liberty interest cognizable under the Fifth Amendment only when it binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts. See, *e.g.*, *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 462-467 (1981); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, 442 U.S. at 10; *Meachum* v. *Fano*, *supra*, 427 U.S. at 226; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976).

Applying this analysis in *Dumschat*, *supra*, 452 U.S. at 465, this Court recently held that a prisoner serving a life sentence has no due process liberty interest at stake in the decision whether to commute his sentence, because "[t]he [commutation] petition * * * is nothing more than an appeal for clemency. * * * In terms of the Due Process Clause, a * * * felon's expectation that a lawfully imposed sentence will be commuted or pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope" (footnote omitted).

Applying these principles to the remission or mitigation process, it is plain that such relief is a matter of executive grace and not designed to create any "property" interest protected by the Due Process Clause. Over 150 years ago, in *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825), this Court described the Customs remission process, enacted by the First Congress, Act of May 26, 1790, ch. 12, 1 Stat. 122, as a "subject submitted to [the Secretary of the Treasury's] sound discretion." Indeed, the Court's description of the remission process is identical to a pardon: "It

presupposes, that the offense has been committed, * * * and affords relief for inadvertencies and unintentional error." 23 U.S. (10 Wheat.) at 291.

The understanding that an administrative application for remission and mitigation invokes a wholly discretionary power and creates no entitlement in the claimant is clearly expressed in the current statute, 19 U.S.C. 1618, enacted in its present form as part of the Tariff Act of 1930. It provides that "the Secretary of the Treasury, if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, *may* remit or mitigate the same *upon such terms and conditions as he deems reasonable and just* * * *" (emphasis added). This statute, like the sentence commutation statute considered in *Dumschat*, grants the claimant no more than the ability to petition for clemency. The decision whether to grant remission or mitigation and the proper terms of such relief are left to the unfettered discretion of the Secretary or his designee.[11] In a manner similar to that of a state parole board, he is empowered, but not required, to remit or mitigate forfeitures upon such terms as he deems "reasonable and just" when he finds that mitigating circumstances warrant such relief. See *Greenholtz*, *supra*, 442 U.S. at 7. There

[11] It is well settled that the decision whether to grant petitions for remission is a wholly discretionary decision of the Executive Branch; courts lack jurisdiction to review the Secretary's action on a petition for remission or mitigation. See *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One 1972 Mercedes Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964).

is, thus, no particular set of facts that, if shown, mandate a decision favorable to the claimant. The prerequisite for application of due process protections consequently is not present here.

2. Assuming, contrary to our previous submission, that the Due Process Clause attaches to determinations concerning petitions for remission or mitigation and that it imposes some time limits on the making of such determinations, the requirements imposed by the court of appeals are nevertheless inconsistent in several respects with this Court's due process holdings. The court of appeals found that respondent's due process rights had been violated solely because it took 35 days to decide his petition for remission or mitigation, but it gave no explanation of how that delay impermissibly prejudiced him and no consideration to the reasons that may have justified the delay. Just the past Term this Court reaffirmed its prior holding that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10, quoting *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). See also *United States* v. *Marion*, 404 U.S. 307 (1971). On both counts, the analysis of the court of appeals is completely lacking.

The court of appeals' conclusion that the 35 days taken to act on respondent's petition for remission or mitigation exceeded the constitutionally permissible maximum time in the case of an automobile seizure—and, indeed, that 24 hours is normally the maximum time tolerated by the Due Process Clause—was evidently prompted by its concern for the potential consequences of depriving an individual of a means of transportation for an extended period of time, especially at the border or some other remote location. App. A, *in-*

fra, 11a; see also *Lee* v. *Thornton*, *supra*. Arguably, this type of consideration could be thought to supply the element of prejudice necessary to establish a due process claim (certainly the brief delay involved here could not possibly injure the claimant's ability to defend against the forfeiture, which was the kind of prejudice involved in *Lovasco*). Upon closer analysis, however, such a conclusion is unsound.

It must be remembered that the class of cases under consideration involves vehicles for which there is probable cause to believe that they have themselves been smuggled into the country (as here) or have been employed for the transportation of illegal drugs or other contraband.[12] The purpose of the remission process is to consider whether there are extenuating circumstances that might justify amelioration of the penalty of forfeiture. As we indicate in the discussion in point 3, this determination often takes some time. A person who attempts to smuggle a vehicle or contraband across the border should be held to have assumed the risk of any inconvenience that might result from its seizure. Accordingly, the hardship involved in loss of the vehicle for a period of several weeks, or even months, while a remission petition is under consideration is simply not the kind of prejudice that activates a due process requirement of speedy disposition.[13]

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[12] If the lawfulness of the seizure is being disputed, the forum provided for that inquiry is a motion for return of property under Fed. R. Crim. P. 41(e).

[13] The error of the court of appeals' decision may perhaps most clearly be demonstrated by considering what the analogous rule would be as applied to seizure of the person—an event surely as inconvenient to the individual as the seizure of his automobile. Under such a rule, an individual who had been arrested on probable cause to believe he had committed a crime and who asked the prosecutor to consider a plea bargain or dismissal of all charges could not be prosecuted at all if the prosecutor failed to respond to such an initiative within 24 hours. No

Moreover, procedures exist to permit the claimant to obtain the return of his vehicle; he can post a bond in the amount of the value of the vehicle. That is what respondent did in this case, two weeks after the seizure, at which time the Jaguar was released to him. Indeed, there is nothing in the record to show why he could not have posted a bond and obtained possession of the car within 24 hours had he wished to do so. Moreover, it can hardly be said in this case that respondent was left stranded at the border. Rather, the Customs agent arranged for transportation for respondent to the nearest town, from which respondent arranged to fly home. In short, the inconvenience suffered by respondent when his effort to smuggle a $24,000 foreign automobile into the United States was thwarted was fairly ascribable to his own misdeed and not to any unfairness in the processing of his petition for administrative clemency.

3. a. Apart from the question of prejudice, the arbitrary holding of the court below that due process ordinarily requires the District Director to act on petitions in car seizure cases within 24 hours is completely contrary to the well accepted notion that due process "is not a technical conception with a fixed content unrelated to time, place and circumstance." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976), quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). See also *Greenholtz*, *supra*, 442 U.S. at 12; *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

Although on rehearing the court of appeals drew back slightly from its absolute requirement that a decision be rendered by Customs within 24 hours, it nonetheless has made clear that extreme haste is necessary in the run-of-the-mill case (see pages 18–19, *infra*).

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one would seriously propose such a rule in the case of arrests, and we are at a loss to understand why it should apply to seizures of property.

Such a decision stands normal due process concepts on their head by completely ignoring that in many cases, in order to give adequate and reasoned consideration to a claimant's petition, Customs must investigate the basis for the factual allegations in the petition. Frequently this involves inquiry concerning events and circumstances beyond those at the site of the seizure or submission of the petition.[14] A 24-hour deadline is a wholly unrealistic limitation on Customs, especially in light of the substantial number of motor vehicles seized at some border checkpoints,[15] and the manpower needed, but not available, to investigate, process and decide petitions for administrative relief.[16]

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[14] For example, an affidavit executed by the Director, Office of Regulations and Rulings, United States Customs Service, that was filed with the government's rehearing petition explains that in many automobile seizure cases it will be impossible even to determine ownership of a seized vehicle within the allotted 24 hour period (App. E, *infra*, 29a). Similarly, in cases involving vehicle forfeitures resulting from discovery of drugs concealed in the vehicle, where the petitioner claims lack of knowledge that the drugs were present, it will be impossible to determine the bona fides of such a contention within the time allowed by the court of appeals.

[15] The Director's affidavit states that at some Customs land border stations more than 10 cars per day are seized for violations of the Customs laws. Given current personnel staffing levels, it would be impossible to act responsibly on even half of those cases within 24 hours (App. E, *infra*, 30a).

[16] The procedure for processing claims for remission of forfeiture, as set forth in the United States Customs Service's *Fines, Penalties and Forfeitures Handbook* 116-119 (rev. 1979), contemplates a multi-step investigation and review process: (1) upon receipt of a petition, an "FP&F" officer will examine the document to determine whether further investigation is needed; (2) if he determines that further investigation is required, he prepares a request for investigation and forwards it to the district director; if additional investigation is not deemed necessary, he prepares a memorandum for the district director recommending a final determination based upon guidelines and

What is worse is that requiring a decision within 24 hours will undermine one of the primary purposes of due process, *viz.*, to reduce the risk of governmental error. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. Haste will unavoidably result in a failure fully to explore and consider facts that are pertinent to a proper determination of whether the claimant's violation of the customs laws was "without willful negligence or without any intention * * * to defraud the revenue or to violate the law" or otherwise involves mitigating circumstances that warrant remission or mitigation (19 U.S.C. 1618). Thus, the imposition of an arbitrary deadline increases significantly the likelihood that the government's decisions themselves will be arbitrary. Indeed, the most logical response to the decision below would be for Customs simply to deny petitions that it has not definitely decided to grant in the brief time available. In many cases, the matter would then be referred under 19 U.S.C. 1603 to the United States Attorney for the institution of judicial forfeiture proceedings.[17]

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applicable precedent, in which event a decision usually is reached within 24 hours; (3) in cases where further investigation is deemed necessary, the district director may refer the case to the Customs Office of Investigation, which will further investigate the allegations contained in the petition or obtain the information specified by the district director; (4) following the investigation, the customs investigator files a report with the district director; (5) upon completion of the investigatory and review processes, the district director decides the action to be taken on the petition and advises the petitioner of the decision in a written opinion that includes a statement of the findings of fact and the reasoning on which the decision relies.

[17] In 90% of all cases of seizure of non-contraband property, the claimant files a petition for remission or mitigation (see 81-1062 U.S. Br. 6-7). The Director's affidavit in this case states that in 95% of car seizure cases in which such petitions are filed, the case is settled administratively without the necessity of instituting forfeiture proceedings: *i.e.*, the vehicle is returned

[Continued—]

As we explained in *$8,850* (Br. 39-40), rules that burden the administrative process thereby undermine the congressional purpose in establishing the remission and mitigation remedy, which is designed to favor an administrative, rather than judicial, resolution of claims resulting from Customs seizures. Moreover, this result is also contrary to the interests of most claimants. As we explain more fully in *$8,850* (Br. 23), most claimants' only realistic hope of reacquiring any of their property is the remission process, and thus denial of their petitions because of time constraints is rarely in their best interests. Certainly remission was the only means available for respondent to reacquire some of the value of his car.

b. We recognize that the decision of the court of appeals, as modified, purports to release the government from strict application of the requirement that petitions must be acted upon within 24 hours, by allowing a "reasonable extension" in cases where "unusual circumstances" exist. The marginal value of this limitation in reducing the damaging effect of the court's decision upon Customs is well illustrated by this case.

A responsible decision on respondent's petition required at a minimum an inquiry (that could potentially extend all the way to Switzerland) into respondent's ownership interest in the seized vehicle, because it was registered in the name of Grace E. Blote, its intended recipient (C.A. App. 11). In addition, the District Director was required to consider respondent's allegations

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[Footnote, continued—]
upon payment of a mitigated amount. According to the Director's affidavit, however, the decision of the court below, if allowed to stand, could necessitate referral of as many as 80% of vehicle seizure cases for judicial or administrative forfeiture proceedings because Customs will be unable to make an informed decision within the allotted period on most petitions (App. E, *infra*, 30a-31a).

that the Customs inspector at the Blaine, Washington Customs station had never asked him whether he had anything to declare and that respondent lacked any intent to avoid paying his customs duty (C.A. App. 13). To evaluate these claims required at least some inquiry into respondent's background, which could not reasonably be based exclusively on respondent's self-serving statements about his reputation for veracity. If anything, Customs should have been commended for reaching a decision on this petition within five weeks. Nonetheless, the court of appeals found that the 35 days that elapsed between submission of the petition and the District Director's disposition of the petition (during most of which respondent had possession of his car) was unreasonable. If the facts of this case do not demonstrate "unusual circumstances," then it is plain that the exception does virtually nothing to limit the arbitrary decision of the court of appeals.[18]

[18] The court of appeals also suggested (App. A, *infra*, 16a n.16) that claimants could waive their rights. There is, however, no assurance that the court's suggestion that a petitioner might waive delays in the administrative process will provide any meaningful relief to the government. Thus, although subsequent to submission of his initial petition for remission or mitigation, respondent filed with Customs a supplemental petition raising additional factual allegations that required further investigation, the court of appeals did not find that such action constituted a waiver of respondent's "right" to immediate action on his petition—this despite the fact that respondent's action clearly demonstrated that, far from desiring immediate action on his initial petition, respondent desired Customs to conduct additional inquiries and to continue its administrative review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX A

VON NEUMANN v. UNITED STATES

JOHN VON NEUMANN, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES.

No. 79–3761.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

Argued and Submitted June 3, 1981.

Decided Nov. 2, 1981.

Appeal from the United States District Court for the Central District of California.

Before TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

BOOCHEVER, Circuit Judge.

This appeal presents the issue of whether the procedures followed by the United States Bureau of Customs (Customs) in processing an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border for failure of the owner to make the required declaration, were consistent with due process. John von Neumann's foreign-bought car was seized by Customs officials at the Canadian-United States border after he failed to declare the car upon en-

*Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

tering the United States. On the day of the seizure, von Neumann filed an administrative claim for remission or mitigation, and later recovered the car after posting a bond as security. Over a month after the petition was filed, Customs remitted $20,900 to von Neumann, but retained $3,600 as a penalty.

Von Neumann filed a complaint in district court, challenging the penalty and the procedures used to assess it. The district court found that von Neumann violated 19 U.S.C. § 1497 by failing to declare the car and thus the seizure was proper. Additionally, the court found that the remission procedure was proper. We agree that seizure was proper under section 1497, but find fatal due process violations in the remission procedure.

FACTS

In 1974, von Neumann purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada. Prior to shipment, von Neumann registered the car in California and obtained California license plates. On January 20, 1975, von Neumann picked up the car in Vancouver and obtained a release from Canadian Customs to take possession. Canadian Customs officials gave von Neumann form A8A, which authorized transportation of the car to the border, and instructed him to deliver the form to the Canadian Customs border station before leaving the country.

Von Neumann and a friend arrived at the United States border checkpoint at Blaine, Washington at 5:00 p.m. on January 20. The Blaine checkpoint is across the highway and slightly south of the Canadian border station. The highway approaching the Blaine Station is a multilane highway with several turnoffs for the Canadian Customs building. Von Neumann testified that he inadvertently passed the Canadian station because of poor visibility and inadequate directions. For whatever

reasons, von Neumann arrived at the Blaine checkpoint without having delivered form A8A to Canadian Customs.

At the Blaine checkpoint, von Neumann and his passenger were briefly questioned by United States Immigration Officer Perkins.[1] Canadian Customs officials had earlier alerted United States Customs that von Neumann's car would be crossing the border, and Perkins matched the description to the car before questioning the occupants. Perkins asked questions relating to citizenship, and specifically asked von Neumann whether he had anything to declare. When von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the case to Customs Inspector Morrison. Upon being asked why he had not declared the car, von Neumann explained that he did not think he was required to declare it. Morrison then seized the vehicle pursuant to 19 U.S.C. § 1497.[2]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred," *see* 19 U.S.C.

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[1] Harley Perkins was an Inspector for the Immigration and Naturalization Service, but had been serving as a designated Customs Officer since August 16, 1974. See 19 U.S.C. § 1401(i). His designation form indicates that he was to receive training necessary to serve as a Customs Inspector for arriving vehicles, aircraft, and vessels.

[2] 19 U.S.C. § 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

§ 1618,[3] explaining that he had intended to deliver the Canadian Customs papers to Canadian Customs but had mistakenly arrived at United States Customs instead. After filing the petition, von Neumann arranged for other transportation into the United States, and left his car with Customs.

On February 3, 1975, von Neumann posted a bond for $24,500, the value of his car, and Customs returned the vehicle.[4] On February 25, 1975, the Seattle Director of the Bureau of Customs[5] informed von Neumann

[3] 19 U.S.C. § 1618 provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

[4] Customs officials have the discretion to release a seized vehicle if the person claiming an interest has a "substantial interest therein." 19 U.S.C. § 1614. In this case Customs required a bond for what it considered the value of the car, as security to cover the penalty assessed. *See* 19 C.F.R. §§ 162.41(a), 162.43, 162.44(b) (1980).

[5] By statute, the Secretary of the Treasury acts on petitions for remission or mitigation. 19 U.S.C. § 1618. This authority has been delegated to district directors in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. § 171.21 (1980). The estimated value of von Neumann's car, $24,500, thus fell within the district director's regulatory authority.

that the penalty for failing to declare the car was being reduced to $3,600, and therefore $20,900 would be refunded. Von Neumann requested administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment.

Having exhausted his administrative remedies, von Neumann filed a complaint in district court on October 14, 1975, seeking: (a) return of the $3,600; (b) injunctive relief to prevent Customs from placing his name on a computer list of violators; (c) a declaration that the seizure and penalty were unlawful.[6] The district court found that von Neumann violated 19 U.S.C. § 1497, and therefore seizure of the car was proper. The court also found that the remission and mitigation procedures were proper, and entered judgment for the government. Von Neumann appeals, challenging the imposition of the penalty as well as the procedures followed by Customs.

DISCUSSION

I. Violation of 19 U.S.C. § 1497

Von Neumann contends that the district court erred in finding that he violated section 1497, because he was never given an adequate opportunity to declare the car. The district court's determination that von Neumann

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[6] Customs filed a counterclaim requesting recovery of the full $24,500 in accordance with 19 U.S.C. § 1497. This claim was apparently based on the argument that since Customs has complete discretion over a petition for remission, von Neumann's challenge reopened the determination and Customs could now assess the full penalty value for the failure to declare. *See United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The district court denied Custom's counterclaim, and Customs has not appealed that aspect of the judgment.

was given an adequate opportunity to declare and yet failed to declare his car is a factual one, which we will not overturn unless clearly erroneous. *United States v. Wagner*, 434 F.2d 627, 628–29 (9th Cir. 1970). *See Vesey v. United States*, 626 F.2d 627, 629 (9th Cir. 1980). The record fully supports the district court's conclusion that von Neumann attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so.

Officer Perkins testified that he asked von Neumann if he had purchased or acquired anything outside of the United States that he was bringing back into the country,[7] and then asked if he had anything to declare. Von Neumann thus had two opportunities to declare the car, yet failed to do so.[8] It is irrelevant whether von Neumann was looking for the Canadian Customs building and did not intend to enter the United States without declaring the car. As the Supreme Court has held,

> "[t]o succeed in a forfeiture action under § 1497 . . . the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent."

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234, 93 S.Ct. 489, 491, 34 L.Ed.2d 438 (1972). In

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[7] Von Neumann claims that Perkins asked whether he had purchased anything in Canada, and he responded negatively because the car was purchased in Switzerland. Perkins testified that his questioning was not limited to purchases in Canada, but included acquisitions anywhere outside the United States. The district court apparently credited Perkins' testimony.

[8] We note also that von Neumann was an experienced importer who had been shipping automobiles between Europe and the United States for over twenty years, and had personally crossed international borders "innumerable times." In spite of this background, von Neumann failed to mention the car after a specific Customs request.

demonstrating that von Neumann failed to declare the car, Customs has shown that the car was subject to forfeiture and that its owner is "liable to a penalty equal to the value of such article [the undeclared car]." 19 U.S.C. § 1497.

Von Neumann argues that because Customs regulations required a written declaration for articles exceeding $25 in value, his oral statement failing to declare the car did not constitute a violation of section 1497. 19 C.F.R. § 148.–12(b)(2) (1980). This argument is without merit. Perkins was not under any obligation to request a written declaration until von Neumann had orally declared the car, nor did von Neumann ever attempt to submit a written declaration.

Von Neumann's final argument is that he was entitled to amend his declaration up until the time his baggage was searched. Although an amendment is proper under Customs regulations, the undeclared item must be "brought to the attention of the examining officer by the passenger." 19 C.F.R. § 148.16(a) (1980). Von Neumann failed to do this. Moreover, Customs was not required to search his baggage. The statute states that customs officers "*may* cause an examination to be made of the baggage . . . ." 19 U.S.C. § 1496 (emphasis added). Section 1496 does not provide protection from seizure up until the time a formal baggage search is conducted. The "search" took place when Officer Perkins observed the car and matched it to the description provided by Canadian Customs.

The district court's finding that von Neumann failed to declare his car, after an adequate opportunity to do so, is not clearly erroneous. We therefore affirm the district court determinations that von Neumann vio-

lated section 1497 and that seizure of the vehicle was proper.[9]

II. Due Process Challenge to the Administrative Procedure under 19 U.S.C. § 1618

A. Petition for Remission or Mitigation

Under 19 U.S.C. § 1618, a person whose property is seized and subject to forfeiture may file an administrative petition for remission or mitigation of the penalty. *See* note 3, *supra*. In cases where the forfeiture value does not exceed $25,000, the district director may remit or mitigate the penalty "under the law and in view of the circumstances, [as] he shall deem appropriate . . . ." 19 C.F.R. § 171.21 (1980). The administrative remission process is independent of a judicial action for forfeiture, which must be initiated promptly. 19 U.S.C. §§ 1602–04; *Seguin v. Eide*, 645 F.2d 804, 808 (9th Cir. 1981); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). In this case, judicial forfeiture proceedings were never initiated; we are only concerned with the propriety of the administrative procedures followed by Customs.

The substantive disposition of remission petitions is committed to the Customs Bureau's discretion, and we will not review its decision on the merits of a claimant's petition. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). In this case, however, von Neumann is challenging the procedures utilized to reach the substantive decision. Specifically, he claims that the delay of over a month in acting on his

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[9]Because we affirm this portion of the district court judgment, von Neumann is not entitled to have his name removed from Customs' computer list of persons who have failed to declare merchandise, as requested in his prayer for injunctive relief.

petition was a denial of his fifth amendment right to due process.[10]

B. Due Process Right to a Prompt Determination

The cases interpreting 19 U.S.C. §§ 1602–04, requiring prompt initiation of judicial forfeiture proceedings, make it clear that due process depends on the circumstances of each individual case. *See e.g. Seguin v. Eide*, 645 F.2d 804, 808–09 (9th Cir. 1981) (delay of almost 5 months excessive); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977) (delay of 11 months excessive); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (delay of 5 months justified). The rule in this circuit is that filing of a petition for remission under section 1618 does not excuse Customs from its burden of prompt re-

[10] Because border seizure is an "extraordinary situation" requiring immediate action, the ordinary due process requirements of notice and hearing prior to deprivation of property are not required. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678–80, 94 S.Ct. 2080, 2089–2090, 40 L.Ed.2d 452 (1974); *Ivers v. United States*, 581 F.2d 1362, 1367–68 (9th Cir. 1978). Customs argues that this was the only issue before the district court, and therefore von Neumann is precluded from arguing that a prompt post-seizure hearing is required.

The pre-trial conference order indicates that one of the issues of law to be considered was:

> "Is the procedure which was instituted against Plaintiff and the Automobile, whereby the Automobile may be forfeited and seized, and then remission and mitigation proceedings begun, an unconstitutional violation of the due process clause of the Fifth Amendment to the United States Constitution." The issue is framed in sufficiently general terms to include both pre- and post-seizure due process requirements. Moreover, the case of *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976), which found post-seizure administrative delay to be a due process violation, was cited and discussed below. We therefore conclude that the propriety of the post-seizure administrative delay is properly before this court.

ferral for judicial forfeiture. *Ivers v. United States*, 581 F.2d 1362, 1372 (9th Cir. 1978).

By contrast, there has been little interpretation of the due process requirements for the remission procedure itself, when judicial proceedings have not been initiated.[11] This is perhaps in part because the statutory language authorizing remission does not place any time restrictions on Customs, while the judicial referral statutes use the terms "immediately," "promptly," and "forthwith". *Compare* 19 U.S.C. § 1618 *and* 19 C.F.R. §§ 171.11–171.33 (1980) *with* 19 U.S.C. §§ 1602–04. The absence of statutory language does not eliminate the constitutional requirement of due process, however. The informal, remedial nature of the administrative petition makes rapid processing essential.

The purposes of the section 1618 remission process have been described as follows:

> [F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.

United States v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193, 202 (C.D. Cal.1978). The need for prompt action is particularly acute where the seized

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[11] A panel of this court recently held that the owner of a vehicle seized for a drug violation under 21 U.S.C. § 881(a) did not have a due process right to a probable cause hearing within 72 hours of seizure. *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, at 819–820 (9th Cir. 1981). The panel found that the strong government interest in enforcing narcotics laws outweighed the individual interest at stake. The *One 1971 BMW* panel was not faced with a challenge to the promptness of remission procedures, since a petition for remission was never filed. *See* at 821–822.

property is an automobile, because "both the necessities and amenities of life may depend upon the availability of an automobile when needed." *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). *See United States v. One 1971 Opel G.T.*, 360 F.Supp. 638, 641 (C.D.Cal.1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. *See Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).

Lee is the only case directly addressing the due process argument advanced by von Neumann. Lee was accused of using his van to bring undeclared persons, merchandise, and marijuana into the country. The van and merchandise were seized, and Lee was assessed a penalty equal to the value of the van. He was informed that the van and merchandise were subject to forfeiture and that he could file a petition for remission or mitigation under section 1618. Lee filed a petition within a few days of seizure and recovered the van after paying $100, the amount of the reduced penalty.[12]

The *Lee* court reversed the penalty assessment because Customs failed to provide Lee with a prompt hearing on his remission petition. The court first balanced the serious nature of the individual property deprivation against the inconvenience to government in providing a prompt determination of the legality of the detention. 538 F.2d at 33. An important factor in the individual's interest is the hardship that even a tempo-

[12] *Lee* was a consolidated appeal, and the factual circumstances of appellant Rich's case were similar to Lee's. Although seizure in *Lee* was pursuant to 19 U.S.C §§ 1460, 1594, and 1595a, and in the instant case was pursuant to 19 U.S.C. § 1497, *Lee* was an interpretation of the remission statute at issue here: 19 U.S.C. § 1618. 538 F.2d at 31.

rary deprivation of an automobile might cause. *See Stypmann*, 577 F.2d at 1343; *One 1971 Opel G.T.*, 360 F.Supp. at 641. On the other hand, once a seizure is accomplished, the government's justifications for delaying a hearing are not compelling. *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976). After balancing the competing interests, the *Lee* court held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33.

Although not bound by the Second Circuit's holding in *Lee*, we find its reasoning persuasive. This court expressly relied on the *Lee* rationale to invalidate a California towing and possessory lien statute[13] in *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977). The statute in *Stypmann* granted towing companies, who had possession of a car because of a traffic violation, a possessory lien on the vehicle to insure recovery of towing and storage fees. The court held that this statute could not withstand a due process attack because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The *Stypmann* court stated:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton*, *supra*, 538 F.2d at 33, a case involving seizure and

[13] Cal.Veh.Code § 22851.

> detention of automobiles in comparable circumstances, held that due process required action on a petition for rescission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Id. at 1344 (footnote omitted).[14] *Lee* was also cited for the propositions that a car is an important individual asset, *id.* at 1342 n.8 & 1344 n.22, and that a court must balance governmental and individual interests to determine due process, *id.* at 1342.

The government contends that *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978), stands for the proposition that the due process requirements of prompt notice and hearing only apply to judicial forfeiture proceedings, not administrative proceedings under 19 U.S.C. § 1618. The issue in *Ivers*, however, was whether the filing of an administrative petition operated as a waiver of a claimant's right to a prompt forfeiture action. The court held that it did not. *Id.* at 1370. In dicta, the *Ivers* court stated:

> Administrative consideration of a claimant's petition for remission is not governed by any statutory or regulatory requirement of promptitude. Nor does it not afford a claimant the full panoply of due process rights inherent in a judicial proceeding. Remission being a matter of legislative grace, the exercise of the Secretary's discretion is not reviewable by the courts.

Id. at 1371. The tone of this statement indicates that the word "not" in the second sentence may be a misprint. It seems that the court was merely emphasizing the informal nature of the administrative process. We agree that an administrative hearing does not re-

[14] *Stypmann* held that five days was too long of a delay, but did not establish what time period would be proper 557 F.2d at 1344–45.

quire all the protections of a judicial hearing, but we believe a claimant is entitled to prompt disposition of an administrative claim.

The balance of the *Ivers* opinion suggests that due process does require a prompt resolution of administrative claims. The court noted that administrative proceedings are informal and inexpensive, and will often obviate the need for judicial action since remission petitions are frequently granted. *Id.* at 1370. If time limits are not imposed on the administrative process, the government might be forced to bring a judicial action prior to the completion of the administrative claim. Once a case is referred for judicial action, the administrative proceedings on a petition for remission must cease. 19 C.F.R. § 171.2(a) (1980). Therefore delay in ruling on a claimant's petition could force a more cumbersome and time-consuming judicial forfeiture action. *See Ivers*, 581 F.2d at 1370, *United States v. Eight (8) Rhodesian Stone Statues*, 449 F.Supp. 193, 202 (C.D.Cal. 1978). The rationale of the *Lee* case is further supported by cases from this circuit. In *United States v. One 1970 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977), we stated: "[f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle." *Id.* at 866 (referring to various stages of the judicial forfeiture procedure). The United States District Court for the Central District of California, citing *Lee*, noted that "[a] growing number of decisions enunciate the proposition that *both* the adjudication of the administrative claim and the filing of a court action when required, must be speedily done." *Eight (8) Rhodesian Stone Statues*, 449 F.Supp. at 200 (emphasis added). *See also Pollgreen v. Morris*, 496 F.Supp. 1042, 1051–53 (S.D.Fla. 1980) (invalidating seizure of vessels used in

Cuban "Freedom Flotilla" for failure to provide prompt post-seizure hearings; relying on *Lee* and *Stypmann*); *FN American Eagle v. State*, 620 P.2d 657, 666–67 (Alaska 1980) (citing *Lee* and *Stypmann* for the proposition that a post-seizure hearing must be prompt even when the government interest is "urgent"). We therefore adopt the *Lee* rationale and hold that due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618. The one month delay in processing von Neumann's petition does not conform to this standard.

C. What Constitutes a Prompt Determination

We have concluded that Customs must act on a remission petition promptly and that the one month delay in processing von Neumann's petition was unreasonable. This court has not yet formulated specific standards, but we are guided by the *Stypmann* court, which held that a five-day delay in providing a hearing violated due process. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977). Although Customs regulations provide specific requirements for remission petitions, including a 60 day limitation on filing a petition, the regulations do not place any time constraints on administrative consideration of a petition. 10 C.F.R. § 171.12(b) (1980); *See generally* 19 C.F.R. §§ 171.11–171.33 (1980).

In the absence of any appropriate regulatory provisions, we find that the imposition of guidelines is necessary to ensure the due process rights of administrative claimants. No showing has been made that the time limits set by the Second Circuit in *Lee* have proved unreasonably burdensome. We hold that in cases involving vehicles of transportation within a district director's authority under 19 C.F.R. § 171.21 (1980),[15] the direc-

[15]The district director has authority to act in cases involving a total value of merchandise not exceeding $25,000. *See* note 5

tor must ordinarily, depending upon the nature of the article seized,[16] act on a petition for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim. Because the administrative delay in processing von Neumann's petition violated his due process rights, we reverse and remand with instructions to enter judgment for von Neumann in the amount of $3,600 plus costs. *See Lee*, 538 F.2d at 33.

CONCLUSION

The district court finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous, therefore the seizure of his car was proper. The delay in processing von Neumann's petition for remission or mitigation, however, violated his due process right to prompt consideration of his claim. Because we hold that Customs must ordinarily act on a petition for remission within 24 hours of receipt, we reverse and remand with instructions to enter judgment for the plaintiff.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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supra. The due process requirements for cases involving greater value than $25,000, which are decided by the Commissioner of Customs, are not before us. *See* 19 C.F.R. § 171.11(a) (1980). We note that the greater the value of the merchandise, the greater the potential for a burden on individual rights. On the other hand, the administrative machinery may need more time to operate when the district director is not authorized to act.

[16] Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed May 1, 1982]

No. 79-3761

DC No. 75-3453-RF

ORDER

JOHN VON NEUMANN, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES.

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge

The Opinion in the above-entitled case is modified as follows:

(1) At page 5512 of the slip opinion, second paragraph, left column, the third sentence is amended to read:

> We hold that in cases involving vehicles of transportation within the district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director should whenever feasible[16] act on a petition for remission or mitigation within 24 hours of receipt.

(2) Footnote 16 is amended to read as follows:

> [16]Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We

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*Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

> do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process. We further do not foreclose the promulgation of a regulation setting forth any appropriate standard in accordance with the principles set forth in this opinion.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79–3761
DC CV 75–3453 RF

JOHN VON NEUMANN, PLAINTIFF/APPELLANT,

vs.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT NO. 30.01, DEFENDANTS/APPELLEES.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and here is affirmed in part; reversed and remanded in part.

Filed and entered November 02, 1981

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-3453-RF

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

JOHN VON NEUMANN, PLAINTIFF,

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS.

This action having come on for court trial before the Honorable Robert Firth, United States District Judge, and after a thorough consideration of the evidence pre-

sented therein, the Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

I

In or about June, 1974 plaintiff purchased a 1974 Panther automobile (hereinafter "automobile") in Switzerland shipped it to Vancouver, Canada with the intention of bring it into the United States.

II

Prior to importation into the United States, plaintiff had the automobile registered in the state of California and obtained California license plates for the automobile.

III

On January 20, 1975, plaintiff and Paul R. Ginther went to the warehouse at the docks in Vancouver, British Columbia where the automobile was being kept, and obtained a release from Canadian Customs to take possession of the automobile. Plaintiff was given Canadian Customs form A8A which authorized him to transport the car from Vancouver to the location of Canadian Customs near the Canadian-United States border in British Columbia. Plaintiff was instructed to deliver form A8A to Canadian Customs upon leaving Canada.

IV

The Canadian Customs office at which plaintiff was to deliver form A8A is known as the Pacific Highway station, and is located across the highway and a little north of the Blaine, Washington, United States border checkpoint. The highway approaching the Blaine, Washington, checkpoint is a multi-lane highway. There were several turn-offs from the highway to the Canadian Customs building prior to reaching the United States

border checkpoint. Nevertheless, plaintiff failed to stop and deliver form A8A to Canadian Customs officials.

V

United States Customs Officials at the Blaine, Washington, checkpoint station had been informed by Canadian Customs officials that an automobile had arrived from a foreign country and had been consigned to plaintiff. Such information included the description and license plate number of the automobile.

VI

Plaintiff and Mr. Ginther arrived in the automobile at the United States border checkpoint at Blaine, Washington, at approximately 5:00 p.m., and they were confronted by United States Immigration Officer Harley Perkins.

VII

Officer Perkins asked several questions of plaintiff and Mr. Ginther relating to the citizenship and birthplace of plaintiff and Mr. Ginther, whether Plaintiff and Mr. Ginther had any firearms or alcohol in the automobile, and whether they had anything to declare to Customs.

VIII

Plaintiff failed to declare the automobile to the United States Customs official. By doing so, plaintiff attempted to introduce the automobile into the commerce of the United States contrary to the Customs laws of the United States.

IX

The automobile was retained by the customs officials, and Plaintiff and Mr. Ginther took a taxi into the

United States, where they arranged for other transportation.

X

Within a couple of weeks of January 20, 1975, plaintiff offered to pay the amount of $24,500.00, in accordance with 19 U.S.C. § 1614 and 19 C.F.R. § 162.44, to secure the release of the automobile without prejudice to any of his rights, and this offer was accepted by Customs.

XI

Plaintiff, prior to leaving the Blaine, Washington border checkpoint prepared, at the request of customs officials, a Petition for Remission or Mitigation of Forfeiture and Penalties incurred. Thereafter, Plaintiff through his attorneys, proceeded with the remission and mitigation procedures.

XII

In or about March, 1975, a decision was made for remission of penalty of all except $3,600.00 which decision was affirmed upon appeal by the Regional Director in San Francisco, California. The remaining $20,900.00 was returned to plaintiff.

XIII

On October 14, 1975, Plaintiff filed a complaint for return of penalty and declaratory and injunctive relief, seeking to have declared improper the penalty in the amount of $3,600.00 assessed against him pursuant to the customs laws of the United States.

XIV

On February 2, 1976, defendants answered and filed a counter-claim for the forfeiture value ($24,500.00) of the goods which plaintiff attempted to introduce into

the commerce of the United States contrary to the applicable statutes and regulations.

XV

To the extent that these findings of fact contain conclusions of law, they shall be deemed incorporated within Conclusions of Law.

CONCLUSIONS OF LAW

I

This court has jurisdiction of this action.

II

Plaintiff violated 19 U.S.C. § 1497 and was subject to penalty or forfeiture thereunder.

III

The seizure of plaintiffs' automobile by the United States Customs officials was proper.

IV

The remission and mitigation procedures were proper.

V

Judgment should be entered for the Defendant on the Complaint and for the Plaintiff and Counterdefendant on the Counterclaim.

VI

To the extent that these Conclusions of Law contain findings of fact, they shall be deemed incorporated within the findings of fact.

DATED: This 20 day of Sept, 1979.

/s/ R. Firth

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
HOWARD GEST
Assistant United States Attorney

Attorneys for Defendant.

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Civil Action No. 79–3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANT-APPELLEE

DECLARATION OF DONALD W. LEWIS
DIRECTOR, OFFICE OF REGULATIONS AND RULINGS
OFFICE OF COMMERCIAL OPERATIONS
UNITED STATES CUSTOMS SERVICE

Donald W. Lewis, being duly sworn, deposes and says:

1. That I am now and since August 12, 1979, have been Director of the Office of Regulations and Rulings, Office of Commercial Operations, United States Customs Service, with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As the Director of the Office of Regulations and Rulings, I am responsible for the development, implementation, and evaluation of Customs servicewide programs, policies and procedures pertaining to regulations and rulings issued by and affecting the Customs Service. In discharging this responsibility, *inter alia*, I exercise supervision over the Entry Procedures and Penalties Division of the Office of Regulations and Rulings. Consequently, I am very involved in and knowledgeable about the Customs Fines, Penalties and Forfeiture (FP&F) Program which among other items includes in-

structions and procedures to be followed in the administrative processing of petitions for mitigation or remission that are filed when automobiles and/or the other merchandise have been seized for forfeiture for violation of the Customs laws. As director, I provide functional supervision and guidance to regional and other field personnel in the area of the administrative processing of petitions for mitigation or remission as well as in all regulations and rulings matters.

2. That from February 1976 to August 12, 1979, I served as Deputy Assistant Commissioner, Office of Regulations and Rulings, U.S. Customs Service with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Among my important duties and responsibilities as Deputy Assistant Commissioner were to review and evaluate Customs regulations and procedures relating to its Fines, Penalties and Forfeitures Program. As a result of court decisions in the 1970's Customs issued an FP&F Handbook in January 1978, which included detailed instructions and procedures to be followed by Customs personnel in the performance of their respective duties in a number of different areas, including the issuance of civil penalties, and the expeditious administrative processing of petitions for mitigation and remission. Subsequently, this Handbook was updated, revised and issued in 1979, as the "March 1979 Revision of the Fines, Penalties and Forfeitures Handbook." I was an active participant in the development and implementation of these FP&F Programs and served as a principal author of the March 1979 revision. I have attached a copy of Chapter IX of the Customs Fines, Penalties, and Forfeitures Handbook, March 1979 revision, which is the version currently in effect and which governs procedures for handling of the administrative petitions. (See Attachment.)

3. That from 1974 to 1976, I was Director, Entry Procedures and Penalties Division, and I had direct su-

pervision of two penalty branches, the Freedom of Information and Privacy Branch and the Entry, Licensing and Restricted Merchandise Branch. My duties as supervisor of the two penalty branches included responsibility for the implementation, review, and evaluation of Customs Fines, Penalties and Forfeitures Program as well as providing leadership, advice and guidance to Customs District Directors and FP&F field officers throughout the country concerning the administrative processing of petitions for mitigation or remission and related matters pertaining to the seizure of automobiles and other merchandise for violation of the Customs laws.

4. That from 1971–1975, I was Chief of the Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As Chief of the Penalties Branch, I participated in the formulation of policy and in the development and implementation of regulations and procedures concerning *inter alia* the administrative processing of petitions for mitigation or remission of fines, penalties and forfeitures. Further, as Chief of the Branch I maintained frequent contact with District Directors, FP&F officers and other Customs personnel servicewide involved in the day to day operation of the Customs Fines, Penalties and Forfeitures Program. In this way I was able to keep informed of the successes and with the difficulties and problem areas associated with the practical operation of the FP&F Program.

5. That as a result of my experience and background having served as Chief of the Penalties Branch, Director, Entry Procedures and Penalties Division, Deputy Assistant Commissioner, Office of Regulations and Rulings and currently as Director, Office of Regulations and Rulings, I have a thorough knowledge and understanding of Customs Fines, Penalties and Forfeitures Program and as such I am familiar with the laws, regulations and procedures pertaining to seizures of mer-

chandise, penalty assessment, the mitigation and remission process and the administrative and judicial forfeiture of seized merchandise.

6. Recently, the Office of the Chief Counsel for the U.S. Customs Service provided me with a copy of the Ninth Circuit's decision in the above-captioned case. I have read and examined the Court's decision several times to determine its impact on Customs Fines, Penalties and Forfeiture Program. Based on my knowledge and experience with Customs FP&F Program, particularly as it relates to the administrative processing of petitions for mitigation or remission, I believe that should this decision be implemented, it will have significant adverse impact and effect on Customs current FP&F Program.

7. Despite expeditious action by Customs upon receipt of petitions for mitigation or remission, in a large number of car seizure cases, 24 hours is simply not enough time for Customs to obtain the information which is necessary in order to make an informed decision on petitions. Many car seizure cases are referred to the Office of Investigations (OI), U.S. Customs Service for investigation and consideration of allegations raised in the petition in accordance with page 119 of the 1979 FP&F Handbook. Upon completion of the investigation by OI, a Report of Investigation is prepared setting forth all available evidence with respect to the information requested on the statements and claims made by petitioners, for transmittal to and use by the District Director or his designee in making his decision on the petition. For example, in many car seizure cases Customs is not able to verify ownership claims by petitioners within 24 hours. In other cases, petitioners' claims of no knowledge of drugs found in vehicles they were driving or claims of ignorance about drugs found in the baggage of a passenger simply cannot be investigated and verified within 24 hours. Since Customs must make

an informed decision on the petition it would be necessary to deny petitions in these cases where further investigation is warranted.

8. In other car seizure cases, petitions for mitigation or remission will have to be denied because the inspector on the line making seizures will not have been delegated the authority to act on petitions on seizures valued over a certain amount of money, thereby necessitating the need for petition referral to the District Director or his designee with the authority to act on the petition and making it impossible to reach a decision within 24 hours. Further, in many of these cases there are significant geographic distances between the inspector seizing automobiles and the person who has the authority to act on the petition. This referral procedure will sometimes require mailing petitions where the distances between seizing officials and deciding officials is great.

9. At some Customs land border stations more than 10 cars per day are seized for violation of Customs laws. If petitions for mitigation or remission are filed immediately in only half of the seizures, it would be virtually impossible (depending on the circumstances of the case) to act on the petitions within 24 hours. In the cases in which a petition is filed several days subsequent to the seizure it may be filed with the District Director who pursuant to procedures set forth in the Customs FP&F Handbook must refer the petition to the FP&F officer for review and his recommendation before a decision is made on the petition by the appropriate officers. See pages 116–118 of Attachment.

10. At the present time approximately 95 percent of petitions for mitigation or remission in car seizure cases are settled administratively i.e. the forfeiture is remitted upon payment of a mitigated penalty, and the vehicle is returned to the petitioner upon payment of the mitigated amount, without the necessity of

instituting either administrative or judicial (depending upon the value of the vehicle seized) forfeiture proceedings.

11. Although the parameters of the *Von Neumann* decision are not clearly defined, a broad reading of the decision, if implemented, could mean that Customs will be compelled to deny petitions within the 24-hour period, rather than make an uninformed or unauthorized decision. As a result, perhaps as high as 75 to 80 percent of the car seizures made by Customs would require referral for either judicial or administrative forfeiture proceedings. Nearly all of these referrals would be cases that under our present system would have been settled by the granting of administrative relief.

12. Briefly stated and in summary, the *Von Neumann* decision if it stands would, in my opinion, have a chaotic and disruptive effect on the implementation of the Customs FP&F Program described in detail in Attachment 1. Many petitioners whose petitions would have been resolved administratively will find themselves tied up in the Federal courts in a more formal and costly proceeding having to retain an attorney and in some cases pay attorney fees and winding up in a much worse position than if Customs could have acted expeditiously on their petition administratively.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ _____

DONALD W. LEWIS
Director, Office of Regulations and Rulings
U.S. Customs Service